

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JERRY DEAN ORMSBY

Claimant

VS.

CITY OF OSAGE CITY

Respondent

AND

CIGNA WORKERS COMPENSATION

Insurance Carrier

AND

KANSAS WORKERS COMPENSATION FUND

Docket No. 141,766

ORDER

ON the 12th day of December, 1993, the application of the Kansas Workers Compensation Fund to review before the Appeals Board the October 26, 1993 Order of Administrative Law Judge Floyd V. Palmer denying the Kansas Workers Compensation Fund's renewed motion to dismiss came on for oral argument by telephone conference.

APPEARANCES

The claimant appeared by and through his attorney, Frank D. Taff, of Topeka, Kansas. The respondent and its insurance carrier appeared by and through their attorney, John B. Rathmel, of Overland Park, Kansas. The Kansas Workers Compensation fund appeared by and through its attorney, James C. Wright, of Topeka, Kansas. There were no other appearances.

RECORD

The record before the Appeals Board included all pleadings filed of record, all orders entered by either the Administrative Law Judge or the Director of the Division of Workers Compensation, and all transcripts of hearings or depositions and all exhibits thereto. The record does include all documents listed as relevant to this decision in the Kansas Workers Compensation Fund's proposed findings of fact and conclusions of law.

ISSUES

- (1) Does the Appeals Board have jurisdiction to hear this appeal?
- (2) Should the Kansas Workers Compensation Fund be dismissed on grounds that it was not timely implied pursuant to K.S.A. 44-567?

FINDINGS OF FACT

(1) Claimant filed application for hearing in this case on January 18, 1990. On January 26, 1990, claimant served notice of regular hearing to be held February 21, 1990. On January 29, 1990, claimant's counsel mailed notice to take deposition of the treating physician. The notice of hearing and deposition were sent to the employer and its insurance carrier.

(2) On February 21, 1990, claimant appeared approximately one hour late for the hearing. No attorney or other representative appeared for the respondent. The Administrative Law Judge took claimant's testimony and set terminal dates. Later on that same date an entry of appearance was made by counsel for the respondent. Respondent filed a notice to implead the Kansas Workers Compensation Fund on February 26, 1990.

(3) Respondent moved to vacate terminal dates set at the hearing of February 21, 1990, arguing that the hearing was not properly constituted as a regular hearing. By order dated April 13, 1990, the Administrative Law Judge initially denied the motion to vacate terminal dates finding that there had been a full hearing. At the hearing on that motion the Kansas Workers Compensation Fund orally moved to be dismissed on grounds that they had not been timely implead. The Administrative Law Judge took the Fund's motion under advisement. The Administrative Law Judge did extend but refused to vacate the terminal dates.

(4) On May 21, 1990, the Administrative Law Judge issued an order denying the Kansas Workers Compensation Fund's motion to dismiss and found that the February 21, 1990 hearing had not been a regular hearing because the claimant had not reached maximum medical recovery and the case was not, in fact, ready for hearing. The Administrative Law Judge also found that the Fund had not been prejudiced by the timeliness of its impleading.

(5) The Kansas Workers Compensation Fund appealed to the Director of the Division of Workers Compensation the May 21, 1990 decision denying its motion to dismiss. The Director of the Division of Workers Compensation considered this appeal on its merits but denied the motion to dismiss, finding that the hearing of February 21, 1990, had not been a first full hearing because it was not one where both stipulations and evidence were taken as required by K.A.R. 15-51-2(d).

(6) In 1993, the Kansas Court of Appeals issued a decision in West-Mills v. Dillon Companies, Inc., 18 Kan. App. 2d 561 (1993). That decision, originally unpublished, was published by order dated July 29, 1993. In that case the Court of Appeals ruled that the previous director's rule expressed in K.A.R. 15-51-2(d) was not consistent with the statutory requirements of K.S.A. 1992 Supp. 44-567(d). Specifically the Court held that it was not necessary to have both stipulations and evidence to constitute the first full hearing. The Court held that any hearing other than a preliminary hearing, where either stipulations or the claimant's testimony is presented is to be considered the first full hearing.

(7) On the basis of the West-Mills v. Dillon Companies, Inc., *supra*, decision, the Kansas Workers Compensation Fund filed on October 8, 1993, a renewal of its motion to dismiss. By order dated October 13, 1993, Administrative Law Judge Floyd V. Palmer denied that renewed motion to dismiss, finding that the hearing of February 21, 1990, although originally designated as a regular hearing, should not be treated as a regular hearing because claimant had not reached maximum medical improvement. The

Administrative Law Judge, under these circumstances, ordered that the February 21, 1990 hearing be treated as a preliminary hearing. Because that hearing was treated as a preliminary hearing, the Fund was considered timely implied.

CONCLUSIONS OF LAW

(1) Section 53 of Chapter 286 of the 1993 Session Laws of Kansas authorizes appeals from all acts, findings, awards, decisions, rulings or modifications of findings or awards made by an Administrative Law Judge. Preliminary awards are not subject to review by the Appeals Board, however, unless it is alleged that the Administrative Law Judge has exceeded the Administrative Law Judge's jurisdiction in granting or denying the relief requested at the preliminary hearing. Section 49 of Chapter 286 of the 1993 Session Laws of Kansas lists certain kinds of findings which are to be considered jurisdictional when made as a part of a preliminary order or award. Those findings include findings such as whether the claimant suffered an accidental injury, whether the injury arose out of and in the course of employment, whether notice was given, and whether written claim was timely made or whether certain defenses apply.

(2) Construing these various sections together, the Appeals Board concludes that its jurisdiction to hear appeals is properly limited to: (1) all final awards, decisions, or orders; and (2) preliminary orders, rulings, or decisions where the Administrative Law Judge has exceeded his or her jurisdiction. The decision made in this case does not fall into either category. The decision by the Administrative Law Judge denying the Fund's motion to dismiss is a preliminary order but is not one where the Administrative Law Judge has exceeded his jurisdiction. It is, therefore, not appealable at this time. It will be subject to review as part of any final award which may be entered.

(3) The Appeals Board finds that it does not have jurisdiction to consider this appeal. The decision by the Administrative Law Judge, therefore, stands and the matter is remanded for further proceedings.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Order of Administrative Law Judge Floyd V. Palmer dated October 26, 1993, remains in full force and effect.

IT IS SO ORDERED.

Dated this _____ day of January, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Frank D. Taff, 3601 SW 29th Street, Topeka, Kansas 66612-1227
John B. Rathmel, 8417 Santa Fe Drive, Overland Park, Kansas 66212
James C. Wright, 1400 Bank IV Tower, Topeka, Kansas 66603
Floyd V. Palmer, Administrative Law Judge
George Gomez, Director